No. 96-1107

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

TEXACO INC. AND SUBSIDIARIES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR EXXON CORPORATION AND SUBSIDIARIES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Commissioner is empowered under 26 U.S.C. § 482 to tax Texaco's crude oil trading company as if it had earned income from reselling Saudi Arabian crude oil when in fact the company was prohibited by Saudi Arabian law from reselling that crude oil at an amount higher than the purchase price.

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INTEREST OF THE AMICI CURIAE

The factbound issue presented in this case affects only two taxpayers, Texaco and Exxon. As noted in the petition, the Commissioner issued similar notices of deficiency to Texaco and Exxon with respect to the Saudi pricing issue, and the two cases were consolidated for trial and decision by the Tax Court on this issue. Pet. 9. Exxon's case remains in the Tax Court because other, unrelated issues for the tax years in question have not yet been resolved. Exxon has a strong interest in the Court's resolution of this case because it potentially would have equal application to Exxon.

Counsel for the parties have consented to the filing of this brief in letters filed with the Clerk of the Court.

ARGUMENT

The Commissioner does not contend that the Fifth Circuit committed error in stating any broadly applicable legal principle or that its decision conflicts with that of other courts. Rather, the Commissioner seeks certiorari here based on the allegation that the lower courts incorrectly applied settled legal principles to the unique facts of this case. In order to justify this unusual request, the Commissioner characterizes the decision below as "a blueprint for the evasion of United States taxes." Pet. 12. The Commissioner's support for this characterization, however, is an incomplete and distorted version of events that is incompatible with the trial court's findings of fact.

A. Introduction

Texaco International Trader, Inc. (Textrad), a U.S. subsidiary of Texaco Inc., served as Texaco's international crude oil trading company. As an offtaker, Textrad purchased Saudi crude oil at the Saudi government's official selling price and then, as required by a resale price restriction imposed by the Saudi government, sold the oil to Texaco's domestic and foreign refining affiliates and unrelated parties at the same official selling price. Pet. App. 23a-24a. Invoking 26 U.S.C. § 482, the Commissioner seeks to allocate to Textrad income that it "would have received if it had sold the Saudi crude oil to its foreign affiliated refineries at its true economic value, rather than at the stipulated Saudi price." Pet. 8. The Commissioner proposed a similar section 482 reallocation with respect to Exxon's offtakers, three U.S. affiliates of Exxon that purchased and resold Saudi crude oil at the official selling price. Pet. App. 19a, 99a-100a.

In *Commissioner v. First Security Bank*, 405 U.S. 394 (1972), this Court held that section 482 does not author-

ize the Commissioner to allocate income to a party that is prohibited by law from receiving it. Applying the principles of *First Security*, both the Tax Court and the Fifth Circuit concluded that the Commissioner lacked the authority to make the proposed allocation because the Saudi resale price restriction prohibited Textrad from earning a profit on the sale of the crude oil. Both courts also rejected the Commissioner's reliance on *United States v. Basye*, 410 U.S. 441 (1973), a case involving a medical partnership that, as a result of bargaining with a health plan, agreed to have a portion of its compensation diverted to a trust fund.

After exhaustively examining the record developed at a lengthy trial, the Tax Court made the following findings regarding the Saudi resale price restriction: (1) it was "not a negotiated contract term" but rather was issued unilaterally by the Saudi government "without discussion or negotiation" (Pet. App. 145a); (2) the Saudi government did not issue the restriction as a result of pressure from the offtakers, nor was there any evidence of collusion between the offtakers and the Saudi government (*id.* at 114a); and (3) the "restriction was not commercial in nature" but instead was the cornerstone of a price moderation policy adopted by the Saudi government "to obtain the defense and foreign policy support of the United States and to meet the need for stability in the world economy" (*id.* at 68a, 144a). *See also id.* at 134a-155a.

The petition portrays a set of facts that is entirely at odds wtih the Tax Court's key findings. For example, the Commissioner characterizes the Saudi resale price restriction as a "consensual, commercial arrangement" (Pet. 19) and implies that the Saudi resale price restriction was designed to shelter the oil companies' profits from taxation (*id.* at 24-25). According to the Commissioner, the Saudi resale price restriction "poured extensive profits into respondent's accounts and also gave it a basis for

contending that a portion of those profits is immune from United States tax." *Id.* at 25 n.14. After reading the Commissioner's petition, one would assume that the sole purpose of the Saudi pricing policy was to confer a tax-free "windfall" on U.S. oil companies. *See id.* at 18. In particular, the petition obscures the sovereign underpinnings of the resale price restriction by virtually ignoring the restriction's central role in the Saudi government's price moderation policy and the role of the consuming countries, notably the United States, in urging the Saudi government to adopt and enforce that policy.

The reason for these omissions is obvious. The Commissioner's legal theory (that *Basye* rather than *First Security* controls) rests on the factual premise that the resale price restriction was a consensual arrangement negotiated by the oil companies. The Tax Court, however, made findings to the contrary. When the facts of this case are fully and fairly related, it is apparent that the lower courts correctly resolved this case by applying the principles of *First Security*.

B. The Consuming Countries' Role in the Saudi Resale Price Restriction

In the late 1970s, the United States government "undertook numerous diplomatic efforts to affect or moderate OPEC crude oil price increases, urging the [Saudi Arabian government] as well as other OPEC Governments to moderate crude oil prices and to increase crude oil production." Pet. App. 68a. Because Saudi Arabia had the "largest supply of crude oil of all the OPEC countries and was a prominent player in OPEC" (*id.* at 28a) the U.S. government placed principal emphasis on the Saudi government. *Id.* at 68a. As a result of the Saudi government's "close relationship with the U.S. Government" (*id.* at 114a) and its desire to "obtain the defense and foreign policy support of the United States" (*id.* at 68a), the Saudi government agreed to moderate its prices and increase its

production during this period. On two different occasions (1977 and 1979), the Saudi government imposed a resale price restriction to ensure that Saudi oil reached the major industrialized countries at the lower Saudi price. *Id.* at 35a-49a. With respect to the 1979 restriction at issue here, the Tax Court found that "official U.S. policy was strongly in favor of enforcing the restriction and seeing that the Saudi policy toward moderation was carried out." *Id.* at 68a.

The first resale price restriction was imposed in 1977, when the Saudi government declined to follow significant price increases voted by OPEC. As a necessary component of its price moderation program, the Saudi government mandated that the prices charged by the offtakers for Saudi crude oil be no higher than the Saudi official selling price. *Id.* at 35a-38a. According to the Saudi Petroleum Minister, the Saudi government wanted to "make sure that the oil companies do not take one cent from the cheap Saudi crude and put it in their pockets. We want the lowest price for the benefit of the consumers." *Id.* at 36a. To enforce the resale price restriction, the Saudi government imposed auditing and reporting requirements (*id.* at 37a) and sought the help of the consuming countries in monitoring the oil companies' compliance and "ensuring that no party other than the final consumer benefits from the low prices." *Id.* at 38a.

A second resale price restriction was imposed in 1979, during the "Second Oil Crisis." The Iranian Revolution, followed by the U.S. embargo of Iranian oil and the Iran-Iraq war, led to a significant drop in Middle East crude oil production and sky-rocketing oil prices. *Id.* at 40a-41a, 65a-67a. During 1979-1981 (the tax years at issue here), world crude oil prices nearly tripled. *Id.* at 41a. The Second Oil Crisis led not only to long lines at gas stations but also to severe economic disruptions in the major oil consuming countries, including spiraling inflation and massive balance of payment deficits. Given the Saudi gov-

ernment's prior willingness to assist the consuming countries, the United States and other oil consuming countries again looked to Saudi Arabia for price moderation.

As in 1977, the Saudi government agreed to exercise price restraint by ensuring that the official selling price for its crude oil lagged behind that imposed by other OPEC members. *Id.* at 45a, 66a-67a. In furtherance of its policy to deliver cheaper oil to the consuming countries, the Saudi government again imposed a resale price restriction. Issued by the Saudi Petroleum Minister and authorized by the King (*id.* at 122a), the restriction required the offtakers to resell the Saudi crude oil at the same official selling price at which they purchased it. The restriction applied to all sales of Saudi crude oil, whether made to related or unrelated buyers. *Id.* at 133a.

The U.S. government and the governments of the major oil consuming countries fully supported the Saudi government's imposition of the resale price restriction and monitored its enforcement. Dr. James Schlesinger, then U.S. Secretary of Energy, testified that he understood that "the 1979 restriction fulfilled the common U.S. and [Saudi Arabian government] objectives to have the lower-priced Saudi crude reach the consuming countries at the lower price." *Id.* at 71a. The Tax Court found that "[o]fficials of the Governments of the United Kingdom, Italy, the Federal Republic of Germany, the Netherlands and France understood the Saudi objective to be the same." *Id.* To ensure that the offtakers complied with the Saudi resale price restriction, the consuming countries shared information about the prices at which Saudi crude oil was imported into their countries. *Id.* at 71a-75a. According to the Tax Court, the "transparency [in oil pricing] created by the information-sharing was important in ascertaining compliance with the restriction" and "ensured that all consuming member countries were being treated the same." *Id.* at 72a.

When the Saudi crude oil arrived at the refineries, the consuming countries had different approaches to capturing the benefit of the lower price. Some, such as the United States, France, the Netherlands, and Japan, imposed price controls to ensure that the consumers benefited directly from the lower prices and that the refiners' profits were capped. *Id.* at 68a, 72a-73a. Other countries, such as the Federal Republic of Germany and the United Kingdom, declined to impose price controls, but rather encouraged pricing restraint through more informal means. *See, e.g., id.* at 74a nn.17, 18. To the extent that the refiners made additional profits as a result of the Saudi pricing advantage, they were subject to tax on those profits.

The petition emphasizes that the resale price restriction did not preclude the oil companies from earning profits on the sale of refined petroleum products. Pet. 6, 9-11, 14-18, 24. For example, the Commissioner repeatedly refers to the following statement by the Saudi Petroleum Minister: "the oil companies are definitely making higher profits in the downstream by refining Saudi crude and selling the products at higher prices. *This we cannot control.*" *See id.* at 6 n.5, 15, 19 n.11 (emphasis added by the Commissioner). The Commissioner, however, omits the final sentence from the Petroleum Minister's statement: "It is the consumers' responsibility." *See* Pet. App. 48a. By omitting this sentence, the Commissioner suggests that the Saudi government was indifferent to the level of profits earned by the refiners. Elsewhere, the Commissioner implies that the Saudi government "planned" for the profits to end up in the oil companies' "pocket[s]." Pet. 24. While it is true that the Saudi Petroleum Minister recognized the limits of Saudi power to control the refined product prices charged in other countries, there is no support in the record for the Commissioner's suggestion that the Saudi government intended for the oil companies to reap the benefit of the Saudi price moderation policy. To the contrary, that policy was designed to benefit the consuming

countries. Pet. App. 71a. The Saudi government rightly acknowledged, however, that "once the oil was delivered to the refineries, it was beyond Saudi jurisdiction" and the regulation of product prices was the consuming countries' responsibility. *Id.* at 95a.

C. The Fifth Circuit Correctly Concluded That the Principles of *First Security* Govern This Case

The Commissioner argues that *Basye* rather than *First Security* controls this case. The Commissioner's position is irreconcilable with the Tax Court's explicit findings that the resale price restriction was neither consensual nor the product of collusion between the oil companies and the Saudi government. Rather, as a key element of the Saudi government's contribution to an international effort to hold down the price that consuming countries would pay for oil, the Saudi resale price restriction clearly is encompassed within the rule of *First Security*.

1. *Applying the Principles of* First Security, *the Fifth Circuit Correctly Held That the Commissioner Could Not Allocate Income to the Offtakers That They Were Prohibited From Receiving by Reason of the Saudi Resale Price Restriction*

Although the Commissioner seeks certiorari on the ground that the court of appeals "misapplie[d]" *First Security* (Pet. 12, 24), the petition neglects to discuss this Court's rationale in that case, which the Fifth Circuit in fact faithfully applied. In *First Security*, the Commissioner invoked section 482 to try to reallocate income to certain banks that an affiliated insurance company had received as reinsurance premiums. The Commissioner's theory was that the income really reflected commissions "earned" by the banks for referring customers to the companies that paid for the reinsurance. *See* 405 U.S. at 396-400. Because banks were prohibited by law from receiving commissions as a result of their customers' purchase of life insurance, this Court held that the Com-

missioner's proposed reallocation exceeded the authority conferred by section 482.

The Court reasoned that Congress did not intend to authorize a reallocation if the taxpayer itself had no power to allocate the income in that manner. Such taxation would violate the principle that, "in order to be taxed for income, a taxpayer must have complete dominion over it"; a taxpayer cannot be held to "have taxable income that he did not receive and that he was prohibited from receiving." *Id.* at 403. Indeed, the Court observed that the Commissioner's own regulation implementing section 482 "expressly recognizes the concept that income implies dominion or control of the taxpayer." *Id.* at 404. The premise of a section 482 reallocation is that the controlling interests "have *complete power* to cause each controlled taxpayer so to conduct its affairs that its transactions and accounting records truly reflect the taxable income . . . of each of the controlled taxpayers." Treas. Reg. § 1.482-1A(b)(1) (1981) (emphasis added). Because "[t]he 'complete power' referred to in the regulations hardly includes the power to force a subsidiary to violate the law" (405 U.S. at 405), the Court held that "[t]he Commissioner's exercise of his § 482 authority was . . . unwarranted." *Id.* at 407.

The lower courts have uniformly understood *First Security* as establishing a general principle that bars a section 482 allocation if a governmental restriction deprives the taxpayer of the requisite degree of control. *See, e.g., Procter & Gamble Co. v. Commissioner*, 961 F.2d 1255, 1259 (6th Cir. 1992); *Bank of Coushatta v. United States*, 650 F.2d 75, 76-77 (5th Cir. 1981). Thus, the court of appeals here was following settled law when it refused to allow the section 482 adjustment because the Saudi resale price restriction denied Texaco "the power to control the sales price of the oil" and the "ability to control the flow of its income." Pet. App. 6a, 10a.

2. *The Government's Proffered Distinctions of* First Security *Are Insubstantial*

The petition argues that *First Security* is inapplicable because it is limited to a "rare" and "narrow factual context." Pet. 16. Specifically, the Commissioner advances three factual differences between this case and *First Security* as grounds for reaching a different result here. These proposed distinctions, however, are either nonexistent or immaterial. The rationale of *First Security* compels rejection of the proposed section 482 adjustment.

a. Although it does not clearly raise the question or discuss it in the petition, the Commissioner suggests at various points (Pet. I, 17 n.10, 25-26 & n.14) that *First Security* does not apply to a restriction imposed by foreign law. This contention was correctly rejected by the Tax Court, which relied on *Procter & Gamble*, 961 F.2d 1255. In that case, the Sixth Circuit held that a Spanish law prohibiting royalty payments to affiliated corporations precluded the Commissioner from imputing royalty payments from a Spanish subsidiary to its Swiss parent company. Multinational corporations must obey the laws of the countries in which they do business, and restrictions imposed by those laws can deprive them of the requisite "complete power" (Treas. Reg. § 1.482-1A(b)(1)) to allocate income among affiliated corporations just as surely as the restrictions imposed by federal or state law specifically addressed by this Court in *First Security*. *See* 405 U.S. at 406 n.22 (noting that *Local Finance Corp. v. Commissioner*, 407 F.2d 629 (7th Cir. 1969), which allowed a section 482 reallocation of income in a manner prohibited by state law, "was erroneously decided"). Indeed, the Commissioner did not dispute this point in the court of appeals, and the 1994 amendments to the regulations explicitly recognize that "foreign legal restrictions" are relevant to the section 482 analysis where, as here, they "affect[ ] the results of transactions at arms length." *See* Treas. Reg. § 1.482-1(h)(2) (1994).

The Commissioner suggests (Pet. 25 & n.14) that U.S. tax authorities cannot respect foreign law restrictions because foreign governments have commercial dealings with U.S. corporations and therefore can be expected to enact laws for the purpose of helping those corporations avoid U.S. taxation. But even that cynical view of foreign legislation in no way justifies a blanket rule that would entitle the Commissioner to ignore *all* foreign legal restrictions. The courts are capable of determining whether a foreign law is legitimate or a sham enacted at the behest of U.S. corporations. The court of appeals in *Procter & Gamble* suggested that the Commissioner's concern could be met by applying a "heightened scrutiny" standard "to be sure the taxpayer is not responsible for the restriction on payment." 961 F.2d at 1259. The Tax Court in this case followed that suggestion (Pet. App. 113a) and nonetheless concluded that the Saudi government adopted the restriction in its own "self-interest," not because of "collusion" or "pressure" from the oil companies. *Id.* at 114a.

b. The Commissioner also argues that *First Security* is inapplicable because the Saudi resale price restriction did not prevent Texaco affiliates from earning profits downstream on the sale of refined petroleum products. Pet. 14-17. This assertion, however, ignores that the usual starting point of a section 482 case is that a taxpayer has earned income somewhere in its corporate family, and the question is whether the government can shift that income to another corporation in the family. In *First Security*, the restriction on the banks did not prevent another member of the corporate family from earning arguably related income in another manner; the insurance affiliate could (and did) earn income from reinsurance premiums on the policies sold to the bank's customers. The Court nonetheless held that the Commissioner could not reallocate that income to the particular corporation that was prevented by a legal restriction from earning it.

The facts here are essentially indistinguishable from those in *L.E. Shunk Latex Products, Inc. v. Commissioner*,

18 T.C. 940 (1952), a case that this Court in *First Security* approved as "closely analogous." 405 U.S. at 406. *Shunk* involved wartime price controls that limited the price at which a manufacturer could sell condoms, but allowed an affiliated distributor to resell the product at a higher price. Just as in this case, the government maintained that section 482 permitted the Commissioner to disregard the government-imposed price controls and reallocate income from the distributor to the manufacturer as if the latter had sold the product at a price higher than that permitted by law. Even though the price controls did not preclude the distributor from earning significant profits, the Tax Court nonetheless held that section 482 did not authorize the Commissioner's proposed reallocation of that income to the manufacturer. 18 T.C. at 961.

c. The Commissioner also argues that *First Security* does not apply because the resale price restriction was a "commercial arrangement, as opposed to a 'law' enacted by a foreign 'sovereign.' " Pet. 19. This contention is flawed both legally and factually. The argument erroneously assumes a clear, legal dichotomy between "commercial" and "sovereign" actions. Just because a foreign government enters into a commercial relationship, it is not true that every action bearing in some way on that relationship should be regarded as a "private," rather than a "sovereign," action. Nothing in the rationale of *First Security* or any other authority suggests that its principles should not apply to a binding, non-negotiated sovereign restriction simply because the "underlying activity" (*id.* at 23) can be characterized as "commercial."

The only support the Commissioner musters for attaching such overriding significance to a "commercial" label is language in cases addressed to the narrow, and very different, question of the circumstances under which a state gives up its own sovereign immunity. *Id.* at 20-22. These quotations have no bearing on the question presented here, which arises from the perspective of a private party that must obey the laws of a sovereign state. When such

a state acts in a sovereign, lawmaking capacity, it binds private parties and constrains their power to act, notwithstanding that the sovereign act touches on an area of commercial activity that might lie outside the state's sovereign immunity.

Thus, in *Bank of United States v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904 (1824), the Court held merely that, where a state creates a distinct corporation for business purposes that is explicitly made subject to suit, the suit is not subject to jurisdictional and Eleventh Amendment constraints that would attach to a suit directly against the state. The Commissioner's invocation of *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) (Pet. 21-23), is even farther afield because that case construes specific statutory language in the Foreign Sovereign Immunities Act, which does not apply to the interpretation of section 482. The other cases cited by the Commissioner (*id.* at 20-21) involve the analogous constitutional question of state immunity from federal taxation. These cases in no way justify the Commissioner's attempt here to ignore the effect on private parties of an action by a sovereign state that undeniably divested them of the control required to support a section 482 adjustment.

As a factual matter, there is no basis for the Commissioner's conclusion that the resale price restriction was not a "sovereign" action by the Saudi Arabian government that implicates the principles of *First Security*. In this connection, the Tax Court specifically found:

> An examination of the historical relationship and of the specific facts leading up to the 1979 pricing restriction at issue here has convinced us that, while the relationship between [the offtakers] and the [Saudi Arabian government] was in part commercial in nature in the sense that it involved the purchase and sale of crude oil, *the 1979 restriction was not commercial in nature.*

Pet. App. 143a-144a (emphasis added). The Tax Court found that the resale price restriction was an integral part of an oil price moderation policy adopted by the Saudi government at the behest of the oil consuming countries, principally the United States. *Id.* at 68a-71a, 124a-125a. As part of a worldwide price control system, the restriction was an action that is much more readily associated with a sovereign than with a private entity. The background of the restriction also stamps it as sovereign. It grew out of diplomatic negotiations among sovereign states, and the critical Saudi interest in those discussions was quintessentially sovereign; as the Tax Court found, the Saudi government's "price moderation policies were designed to obtain the defense and foreign policy support of the United States and to meet the need for stability in the world economy." *Id.* at 68a. By contrast, the "commercial" partners of the Saudi government were complete outsiders to the process leading up to the restriction; it was promulgated "without discussion or negotiation" with the offtakers. *Id.* at 145a. In short, the Saudi restriction was not the type of action that would occur in a private commercial arrangement, and there is no basis for challenging the decision below on the ground that the restriction was not a sovereign action.

The Commissioner's position here is particularly perverse because it ignores the U.S. government's pivotal role in the development and enforcement of the Saudi government's oil price moderation policy. The Tax Court specifically found that, "[a]fter the 1979 restriction was issued, official U.S. policy was strongly in favor of enforcing the restriction and seeing that the Saudi policy toward moderation was carried out." *Id.* at 68a. The goal of that policy was to deliver lower priced Saudi crude oil to the consuming countries. The U.S. government understood that the policy it urged inevitably would allow refiners to earn additional income as a result of their access to lower priced Saudi crude oil. It was further contemplated that, while some of the income would be

subject to U.S. tax, some of the income would be subject to tax by the other consuming countries. There is no basis for the U.S. government to do an about-face today and argue that the Commissioner has the power to disregard these governmental actions and reallocate to the U.S. off-takers income that was, in accordance with the Saudi restriction, earned in and subject to tax by foreign countries.

3. *The Commissioner's Proposed Section 482 Allocation Is Improper Under the Regulation's Tax Parity Standard*

As the court of appeals explained, "the purpose of § 482 is to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer." Pet. App. 12a (internal quotation marks omitted). Accordingly, the standard explicitly stated in the regulations for making a section 482 adjustment "is that of an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer." Treas. Reg. § 1.482-1A(b)(1). *See also, e.g., Eli Lilly & Co. v. Commissioner*, 856 F.2d 855, 860 (7th Cir. 1988); *Lufkin Foundry & Machine Co. v. Commissioner*, 468 F.2d 805, 807-08 (5th Cir. 1972).

The "tax parity" standard was already satisfied by Texaco's sales of Saudi crude oil to its refining affiliates at the same price at which that crude oil was sold to unrelated parties. Indeed, the Commissioner's proposed adjustment would turn section 482 on its head by *destroying* the existing tax parity between controlled and uncontrolled taxpayers and instead forcing Texaco to account for its sales to affiliated entities at a different price from the one used in arm's-length transactions between unrelated parties. Thus, the court of appeals correctly concluded that, "under the regulation's tax parity standard, the Commissioner's allocation of Texaco's income under § 482 is improper." Pet. App. 13a.

D. *United States v. Basye* Has No Application to This Case

The Commissioner argues that the resale price restriction was a "consensual agreement" that cannot defeat a section 482 adjustment. It relies upon *United States v. Basye*, 410 U.S. 441 (1973), where this Court rejected the attempt of a medical partnership to avoid taxation on its full compensation by agreeing to have a portion of the compensation paid directly to a retirement trust. In a footnote, this Court explained that *First Security* did not support the taxpayer because it involved "a deflection of income imposed by law," whereas *Basye* involved "an assignment [of income] arrived at by the consensual agreement of two parties acting at arm's length." *Id.* at 453 n.13. Seizing on this footnote, the Commissioner characterizes the Saudi resale price restriction as a negotiated, consensual arrangement between the offtakers and the Saudi government, which was designed to shelter the oil companies' profits from U.S. taxation. Pet. 17-18.

The Commissioner's legal theory rests on a factual premise that is fundamentally at odds with the Tax Court's findings. After reviewing the evidence, the Tax Court rejected the Commissioner's argument that the Saudi restriction was consensual, finding instead "that the restriction was not a negotiated contract term" and was issued "without discussion or negotiation." Pet. App. 145a. The Tax Court also rejected the Commissioner's collusion theory, finding instead "sufficient evidence in the record of Saudi self-interest in issuing the restriction—*particularly in terms of its close relationship with the United States, which encouraged price moderation at the time*—that [it was] unable to conclude that the [Saudi Arabian government] issued the restriction as a result of pressure from" the oil companies. *Id.* at 114a (emphasis added).

The Tax Court also found that compliance with the Saudi resale price restriction was mandatory. *Id.* at 134a-155a. In fact, adherence to the restriction was regarded as a matter of grave importance to the Saudi government.

After imposing the 1977 restriction, the Saudi government issued a statement cautioning that a violation of the restriction would be considered "a hostile act against Saudi Arabia" and would "be held to be working against the interests of the Kingdom." *Id.* at 36a. The 1979 restriction was taken equally seriously. According to the Tax Court, "there would have been potentially serious consequences if [the oil companies] had violated the 1979 restriction." *Id.* at 51a.

In an attempt to divert attention from the Tax Court's adverse factual findings (specifically, that the Saudi restriction was not promulgated at the behest of the oil companies), the Commissioner focuses on the offtakers' alleged "consent" to purchase the oil. Pet. 17-18. As the Tax Court found, however, there was no such "consent" in any meaningful sense because the offtakers had no realistic option of declining to buy Saudi oil. Pet. App. 147a-148a. "Continued access to Saudi crude was critical to [the oil companies] during the period at issue, because it was their largest internationally traded crude oil source, representing about 50 percent of Exxon's and 78 percent of Texaco's crude oil supply." *Id.* at 51a-52a; *see also id.* at 20a n.5.

* * * *

There is no justification for further review by this Court. The decision below is factbound and presents no broadly applicable issue that would warrant exercise of this Court's discretionary jurisdiction. The court of appeals' decision is supported by two settled legal principles under section 482, the rule of *First Security* and the tax parity standard. The Commissioner has attempted to create an argument that this case involves a "consensual agreement" under *Basye*, but can do so only by distorting and disregarding the Tax Court's findings of fact. Although the Commissioner wants to ignore the role of the U.S. government, the Tax Court found that the U.S. government was instrumental in urging the Saudi government to adopt its price moderation policy and in enforcing the

Saudi resale price restriction. The Commissioner may not now recharacterize that very Saudi government restriction as no more than a "consensual, commercial arrangement" that can be overridden under section 482.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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